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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DAVID GUZMAN, Defendant and Appellant.	B155463 (Super. Ct. No. NA048317)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bradford L. Andrews, Judge. Affirmed.

Audrey Egan, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Attorney General, and Steven E. Mercer, Deputy Attorney General, for Plaintiff and Respondent.

Defendant David Guzman appeals from the judgment entered after a jury convicted him of attempted carjacking (Pen. Code, §§ 664/215, subd. (a)) and attempted robbery (Pen. Code, §§ 664/211), contending that a personal firearm use enhancement (Pen. Code, § 12022.53, subd. (b)) should not have been imposed. For the reasons set forth below, we affirm the judgment.

FACTS AND PROCEDURAL HISTORY[1]

At around 6:40 p.m. on March 1, 2001, Saul Duenas Araiza had just finished pumping gas at a Long Beach gas station when David Guzman approached, pointed a handgun at him, and demanded that Araiza turn over the keys to his pickup truck. Araiza raised his hands and told Guzman that the keys were inside. Araiza's wife, Guadalupe Sanchez, was sitting in the truck's passenger seat. She saw a man standing next to her husband along the driver's side of the truck. Sanchez heard the man ask for the keys and heard her husband say he did not have them. She also noticed that her husband had his hands up in the air. Sanchez next saw Guzman turn toward the driver's side door. As Guzman began to enter the truck through that door, Sanchez fled out the passenger door. She never saw whether Guzman was holding anything in his hands.

Guzman was charged with two counts of attempted robbery (Pen. Code, §§ 664/211) and two counts of attempted carjacking (Pen. Code, §§ 664, 215, subd. (a)), along with personal firearm use enhancement allegations (Pen. Code, § 12022.53, subd. (b)) for the incident with Araiza and Sanchez.[2] The jury convicted

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[1] In accord with the usual rules on appeal, we state the facts in the manner most favorable to the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

[2] Guzman was also charged with the separate, unrelated robbery and carjacking of another victim, along with a charge of being a felon in possession of a firearm. (Pen. Code, § 12021, subd. (a)(1).) He was convicted of the firearm possession charge, but the jury deadlocked on the robbery and carjacking counts, which were

Guzman of all four counts related to Araiza and Sanchez and also found true the allegations that he personally used a firearm when committing those crimes. The primary issues raised on appeal concern the firearm use allegation as to Sanchez: (1) because Sanchez did not see the gun, there was no evidence that Guzman used it as to her; and (2) the court erred by instructing the jury that the prosecution did not have to prove the victim was aware of the gun's presence. Guzman also contends the court erred by instructing the jury with CALJIC No. 17.41.1.

DISCUSSION

1. Firearm Use Enhancement

The jury was asked to determine whether Guzman personally used a firearm during the attempted robbery and carjacking of Araiza and Sanchez. (Pen. Code, § 12022.53, subd. (b) [10-year enhancement for intentional and personal use of a firearm during the commission of certain designated felonies].) Relying on *People v. Granado* (1996) 49 Cal.App.4th 317 (*Granado*), the trial court instructed the jury that in order for the gun use enhancement to apply, it was not necessary to prove that Guzman's victims had been aware he had a gun. Guzman asks that we reverse the firearm use enhancement as to Sanchez because: (1) the court's instruction that Sanchez did not need to be aware of the gun was wrong; and (2) there was insufficient evidence that she knew he had a gun. We reject his contentions.

In *Granado*, the defendant and his partner approached two men and demanded their money. The defendant's partner pulled out a machete, causing one of the victims to turn and run, with the machete-wielder in pursuit. The defendant then pulled a gun from his waistband and displayed it while asking the remaining victim for money. On appeal from his attempted robbery convictions, the defendant raised two challenges to the personal firearm use enhancements that were added to his

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later dismissed. Because no issues are raised on appeal as to those counts, we will not describe or discuss them.

sentence: First, as to the victim who remained and saw the gun, defendant's mere display of the gun did not prove he used it; and second, because there was no evidence that the second victim who ran off ever saw or otherwise knew about the gun, the weapon had not been used against that victim.

As to the first contention, the *Granado* court noted that the personal gun use statutes are to be broadly construed in order to deter the increased risk of serious injury that accompanies any deployment of a gun during the commission of a crime. (*Granado, supra,* 49 Cal.App.4th at p. 322.) While mere incidental possession of a gun is not enough, when a defendant displays a gun or otherwise makes its presence known so he can intimidate a victim or others in order to carry out the underlying crime, there has been a sufficient facilitative use of the weapon for purposes of the firearm use enhancements. (*Id.* at p. 325.)

The same reasoning led the *Granado* court to hold that a crime victim did not have to know the defendant had a gun to make the enhancement applicable. Because the purpose of the statute was to make a would-be robber keep his gun in his waistband, once the gun was deployed to further the crime, the enhancement applied: "To excuse the defendant from this consequence merely because the victim lacked actual knowledge of the gun's deployment would limit the statute's deterrent effect for little if any discernible reason. [Citation.]" (*Granado, supra,* 49 Cal.App.4th at p. 327.) As a result, the court held that the only mental state required for a firearm use enhancement is the defendant's intent to use the gun in furtherance of the crime. (*Id.* at p. 328.) This rule would apply even if the victim were blind because the thrust of the offense is to deter the public exhibition of weapons; the victim's inability to perceive the weapon does little to mitigate the inherent dangers of such displays. (*Id.* at p. 329, fn. 10.)[3]

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[3] Although the *Granado* court was construing the personal firearm use enhancement provided by Penal Code section 12022.5, decisions interpreting that statute's terms have been used when deciding whether a defendant made personal use

Guzman contends *Granado* is at odds with the Supreme Court's statement in *People v. Chambers* (1972) 7 Cal.3d 666, 672 (*Chambers*), that gun use requires proof of conduct that "produces a fear of harm or force . . . ." Guzman apparently views this as a requirement that the victim know the gun is there. As the *Granado* court observed, however, such a requirement is at odds with the *Chambers* decision as a whole, its injunction to broadly construe the gun use statutes, and the facts at issue in that case. (*Granado, supra,* 49 Cal.App.4th at pp. 327-328.) We therefore hold that the trial court correctly instructed the jury in accord with *Granado*.

We also hold that there was sufficient evidence to support a finding that Guzman personally used a gun as to Sanchez. She heard Guzman demand the keys from Araiza, along with Araiza's response that the keys were in the truck. She also saw that Araiza had his hands in the air and, according to Araiza, got out of the truck because she heard what was happening.[4] The jury could infer that Guzman's display of the gun held Araiza in place while he entered the truck in search of the keys and could also infer that Guzman still had the gun in his hand when he did so. The obvious intent and effect of this gun use was to facilitate Guzman's attempt to steal the pickup truck and permits a finding that Guzman used the gun in the attempt to rob and carjack Sanchez, who was seated in the passenger compartment where the keys could be found. (*Granado, supra,* 49 Cal.App.4th at p. 331 [even if victim who ran off did not see the gun, the weapon was deployed to control the conduct of both

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of a gun for purposes of Penal Code section 12022.53. (See *People v. Mason* (2002) 96 Cal.App.4th 1, 12-14; *People v. Martinez* (1999) 76 Cal.App.4th 489, 493.)

[4] Although Sanchez said she did not see anything in Guzman's hands, she was never asked any further questions about whether she somehow knew or otherwise perceived that Guzman had a gun. (*People v. Jacobs* (1987) 193 Cal.App.3d 375, 381 [gun use enhancement affirmed where victim who did not see the gun was "by sensory perception . . . made aware of its presence"].) We believe the jury could easily infer that Sanchez deduced that her husband was being robbed at gunpoint based on what she saw and heard.

victims and neutralized the victim who saw the gun from interfering with the successful completion of the crime].)

2. CALJIC No. 17.41.1

The jury was instructed with CALJIC No. 17.41.1, which states, "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation." Guzman contends this instruction is constitutionally infirm because it: infringes upon the power of jury nullification; leads to coercion of holdout jurors, thus violating a defendant's right to a unanimous verdict by an impartial jury; and interferes with a defendant's right to have a jury which deliberates freely and frankly.

Six days before Guzman filed his reply brief, the Supreme Court rejected these arguments in *People v. Engelman* (2002) 28 Cal.4th 436 (*Engelman*). The defendant in *Engelman* appealed his robbery conviction, contending that the trial court erred by instructing the jury with CALJIC No. 17.41.1. The Court of Appeal affirmed, holding that the jury had the power but not the right to engage in nullification, and rejecting defendant's claim that the instruction violated his constitutional rights to trial by jury, to the independent and impartial judgment of each juror, and to a unanimous verdict. The Supreme Court in *Engelman* affirmed. Even though it agreed with the Court of Appeal that the defendant's state and federal constitutional claims lacked merit (*id.* at pp. 441, 444), the Supreme Court also said the instruction posed too great a risk of intruding on the jury's deliberative processes and ordered that it no longer be used. (*Id.* at pp. 446-449.)

Guzman does not contend and the record does not show that the instruction produced any of the dire effects that prompted the Supreme Court to halt its further

use. Although the jury hung on the two unrelated robbery and carjacking counts, there are no indications of any reports to the court about jurors who refused to follow the court's instructions or of any difficulties whatsoever in reaching a verdict on the five remaining counts. Absent such reports, there was no occasion for the trial court to intrude into the jury's deliberations. Finally, to the extent any error might have occurred, we choose to follow pre-*Engelman* decisions that applied a harmless error standard when evaluating a defendant's challenge to CALJIC No. 17.41.1. (*People v. Molina* (2000) 82 Cal.App.4th 1329, 1332-1335 (*Molina*) [reversal not required if error was harmless beyond a reasonable doubt].) Because the record does not show that the instruction had any effect on the trial's outcome, we alternatively hold that any error caused by its use was harmless beyond a reasonable doubt.

DISPOSITION

For the reasons set forth above, we affirm the judgment.

NOT FOR PUBLICATION.

RUBIN, J.

We concur:

COOPER, P.J.

BOLAND, J.